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IN THE

Supreme Court of the United States

October Term, 1985

NO. _____

SHARP ELECTRONICS CORPORATION,
Cross-Petitioner,

v.

BUSINESS ELECTRONICS CORPORATION,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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10 Pl

QUESTION PRESENTED

Whether vertical price fixing agreements should be evaluated under the rule of reason, rather than being deemed *per se* illegal under § 1 of the Sherman Act.

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Sharp Electronics Corporation ("Sharp")[1] respectfully cross-petitions, pursuant to Rule 19.5 of this Court, for a writ of certiorari to review the judgment in this case entered by the United States Court of Appeals for the Fifth Circuit on January 21, 1986. Business Electronics Corporation ("BEC"), the cross-respondent herein, has petitioned for a writ of certiorari (No. 85-1910) to review the judgment which is the subject matter of this cross-petition.

[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Sharp Electronics Corporation represents that its parent corporation is Sharp Corporation and that it has no subsidiaries or affiliates.

OPINION BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 1212. The opinion appears in the Appendix to the petition of BEC, as does the opinion of the District Court denying Sharp's motion for new trial and judgment n.o.v., which opinion has not been reported. The judgment of the Court of Appeals and the order denying BEC's Suggestion for Rehearing *En Banc* also appear in the Appendix to the petition of BEC.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 21, 1986. BEC filed a timely Suggestion for Rehearing *En Banc,* which was denied on February 20, 1986, and filed its petition for a writ of certiorari within 90 days of that date. The petition was received by Sharp on May 21, 1986 and this cross-petition is timely filed, pursuant to Rule 19.5 of this Court, within 30 days of Sharp's receipt of the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Sharp is the supplier of, among other things, Sharp brand electronic calculators. BEC was, until the events giving rise to this litigation, a Sharp electronic calculator dealer in the Houston, Texas area.

In 1973, Sharp terminated business dealings with BEC. BEC maintained that this termination was undertaken pursuant to an agreement between Sharp and its other Houston area dealer, Gilbert Hartwell ("Hartwell"), was motivated by BEC's discount pricing of Sharp brand calculators, and constituted a *per se* violation of § 1 of the Sherman Act. Tr. at 668-70.[2] BEC thus commenced an action against Sharp in United States District Court relying on 15 U.S.C. §§ 4 and 15 and 28 U.S.C. § 1332 as the basis for federal jurisdiction.

At trial, Sharp maintained the reason for its termination of dealings with BEC was not BEC's low pricing, but rather BEC's free riding—the fact that BEC had dispensed with its entire sales staff, did no advertising, relied on Hartwell to educate prospective customers about the use of the then new, complex and expensive electronic calculator, and then procured the sale by offering Hartwell's customer a flier advertising the Sharp product at prices well below what Hartwell or any other full service dealer could ever hope to meet. Tr. at 279-80; 283-84; 343-44; 346-48.

While the question of Sharp's motive in terminating dealings with BEC was hotly disputed, the record respecting the effect of the agreement alleged by BEC on the relevant market was not in dispute. The undisputed record showed:

a. In 1973 some 100 brands of electronic calculators competed with the Sharp brand and, if anything, there has been an increase in inter-brand competition, and a decrease in Sharp's share of the market, since that time. Tr. at 931; *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1221 (5th Cir. 1986) (Jones, J., concurring).

[2] References to the trial transcript will be made as "Tr. at ."

b. In the period between the BEC termination and trial, the average retail price of all brands of electronic calculators decreased dramatically. Tr. at 893-94; 1024; 1027-28; *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d at 1221 (Jones, J., concurring).

c. In the period between the BEC termination and trial, the average retail price for Sharp electronic calculators in the relevant market also decreased dramatically. Tr. at 342-43; 893-94; *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d at 1221 (Jones, J., concurring).

At the close of the evidence, BEC sought instructions to the effect that if the jury found Sharp terminated dealings with BEC pursuant to an agreement with Hartwell and because of BEC's price cutting, it must find that Sharp violated § 1 of the Sherman Act, irrespective of whether the agreement had any effect on the relevant market. Sharp, conversely, sought instructions that the agreement alleged did not constitute a vertical price fixing agreement and that, in any event, all vertical agreements, including vertical price fixing agreements, should be subject to the rule of reason rather than a *per se* rule. The District Court rejected Sharp's proposed instructions, gave BEC's requested instructions instead, and Sharp specifically objected to this. Tr. at 1584-87; 1594-95; 1598-99; Defendant's Exhibit No. 121, Instructions 23 and 26.

The jury returned a verdict for BEC, and after judgment in the amount of $2,036,875 was entered on the verdict, Sharp appealed. While the Court of Appeals reversed the judgment, it did so only because it found the jury was not properly instructed as to what constituted a resale price fixing agreement. 780 F.2d at 1218. Despite the fact that Sharp renewed its argument that all vertical restraints should be deemed subject to the rule of reason, *see Business*

Electronics Corp. v. Sharp Electronics Corp., 780 F.2d at 1216 n.1, the court specifically held that if an agreement between Sharp and Hartwell respecting the latter's resale prices could be proven, it would be *per se* illegal under § 1, *id.* at 1217-18, and for this reason remanded the case for a new trial. *Id.* at 1220.

BEC's petition to this Court challenges the Court of Appeals' definition of vertical price fixing. This cross-petition raises the related and dispositive question of whether vertical price fixing agreements, like all other vertical restraints, should now be deemed subject to a rule of reason analysis.

REASONS FOR GRANTING THE CROSS-PETITION

The rule that vertical price restraints are conclusively presumed *per se* injurious to competition and therefore illegal was conceived in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In subsequent cases, this Court simply assumed, without analysis, that vertical price restraints remain *per se* illegal. Thus, despite far ranging changes in antitrust law and policy recently enunciated by this Court, it has not considered whether the 75 year old rule that vertical price restraints are *per se* illegal should remain the law. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 16-17, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)[3].

In rejecting Sharp's contention that vertical price restraints must, in light of recent decisional law and policy, be subject to a rule of reason analysis, the United States Court

[3] The United States urged in *Monsanto* that this Court accept for review the same question tendered here and, upon review, hold vertical price restraints to be subject to rule of reason analysis. This Court declined to consider that question only because it had not been properly preserved in lower court proceedings. 465 U.S. at 761-62 n.7. Here, conversely, the issue was preserved by Sharp and is properly before the Court.

of Appeals for the Fifth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Sharp respectfully suggests that that question should now be reviewed by this Court for the following reasons:

I. Application Of The *Per Se* Rule To Vertical Price Restraints Makes No Sense In Light Of This Court's Most Recent Antitrust Opinions.

Although for many years vertical customer and territorial restraints were *per se* illegal, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court overturned that rule, recognizing that such restraints had significant pro-competitive values and thus should not be condemned without consideration of their actual competitive effect in particular cases. *Id.* at 51-52, 57-59.

But this Court has also recognized that vertical price restraints are frequently indistinguishable—both in form and effect—from non-price restraints, *Monsanto, supra,* 465 U.S. at 762, and it has also been acknowledged that such restraints have many of the same pro-competitive qualities as those which led the Court to rule that vertical territorial and customer restraints should not be summarily condemned. *Sylvania, supra,* 433 U.S. at 70 (White, J., concurring); Brief for the United States as Amicus Curiae in Support of Petitioner on Writ of Certiorari at 6, 21-22, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). This view has been widely endorsed by leading antitrust commentators. As Professor Posner explained, a resale price fixing agreement

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify exclusive territories are equally available to justify resale price maintenance.

Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. CHI. L. REV. 6, 9 (1981). *Accord* Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ANTITRUST L.J. 135, 171 (1984); Bork, *Vertical Restraints: Schwinn Overruled,* 1977 SUP. CT. REV. 171, 181-82.

Not only do the same pro-competitive considerations that justify vertical restraints generally pertain to vertical price restraints, but even this Court acknowledged in *Monsanto* that it is frequently impossible to distinguish price from non-price vertical restraints either by analysis of the conduct of the defendant or the effect of the restraint in the marketplace. 465 U.S. at 762.

However, because courts are required to treat differently as a matter of law restraints that are not distinguishable as a matter of fact, the result has been a spate of irreconciliable decisions among, and often within, the circuits, and an antitrust jurisprudence that is as comprehensible to all concerned as the *Jabberwocky* was to Alice. *Compare, e.g., Roesch, Inc. v. Star Cooler Corp.,* 671 F.2d 1168 (8th Cir. 1982), *aff'd by an equally divided Court,* 712 F.2d 1235 (8th Cir. 1983) (en banc), *cert. denied,* 466 U.S. 926 (1984), with *Battle v. Lubrizol Corp.,* 673 F.2d 984 (8th Cir. 1982), *aff'd by an equally divided Court,* 712 F.2d 1238 (8th Cir. 1983) (en banc), *cert. denied,* 466 U.S. 931 (1984); *Cernuto, Inc. v. United Cabinet Corp.,* 595 F.2d 164, 170 (3d Cir. 1979), with *Valley Liquors, Inc. v. Renfield Importers, Ltd.,* 678 F.2d 742, 744 (7th Cir. 1982) (" . . . There is a certain unreality in the careful parsing of motives that *Cernuto* seems to require"). *See also Hochstadt v. Worcester Foundation,* 545 F.2d 222 (1st Cir. 1976) (because territorial restraints are subject to the rule of reason, supplier's requirement that dealers charge list price or higher on sales outside assigned territories, a practice that would be *per se* illegal if imposed on sales within assigned territories, was subject to rule of reason because it was a lesser restraint than banning out of territory sales altogether, as *Sylvania* would permit).

This Court has warned that too broad an application of the *per se* rule in the vertical context is dangerous, because it can deter practices that are actually beneficial to competition. *Sylvania, supra,* 433 U.S. at 51-52, 57-59. Continuing to treat vertical price restraints as *per se* illegal, while acknowledging that in form and effect they are indistinguishable from other, presumptively legal, vertical restraints is not only anomalous, *see* Easterbrook, *supra,* at 171, and not only ensures an ever swelling volume of lawsuits by terminated dealers, *see Business Electronics Corp. v. Sharp Electronics Corp.,* 780 F.2d at 1222 (Jones, J., concurring), but it presents the precise danger warned of in *Sylvania* as well. As the United States put it in *Monsanto,* asking this Court to rescind the rule of *per se* treatment for vertical price restraints:

> [T]he overbroad rule that prohibits all resale price maintenance, without regard to its actual impact in the marketplace, is unwarranted; it disserves consumers by precluding beneficial practices along with those that are pernicious.

Brief for the United States as Amicus Curiae in Support of Petitioner on Writ of Certiorari, *supra,* at 7.

In her concurring opinion below, Judge Jones noted there is only one solution to this problem:

> The Supreme Court should take the earliest opportunity to review its Russian roulette approach to vertical price restraints.

780 F.2d at 1222. That opportunity is here. This Court should grant the cross-petition to resolve whether the *per se* rule has continued vitality in the vertical context in light of its recent antitrust jurisprudence.

II. Application Of The *Per Se* Rule To Vertical Price Restraints Makes No Sense In Light Of The Record In This Case.

This Court has long held that the normal test for legality under § 1 is the rule of reason test which measures actual

market impact, and that "*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1, 5 (1958).

The factual record in this case shows that all the benefits of healthy competition have been realized in the electronic calculator market, notwithstanding the alleged vertical price fixing agreement engaged in by Sharp. For this reason, Judge Jones opined:

> I believe this case perfectly illustrates the arguments why vertical price restraints should be tested under antitrust's Rule of Reason rather than, as *Monsanto* continues to require, per se illegality. There is no social benefit to subjecting manufacturers' pricing relationships with their distributors to potential per se illegality where they operate in markets whose interbrand competitiveness overwhelms any detrimental effects of those relationships.
>
> . . . The larger conclusion that can be drawn from the scenario of this case is that assuming the continued variety, vitality and innovation of the American free enterprise system, it is unrealistic to conclude that measures taken by a manufacturer to enhance his product's marketability, whether related to price or not, are anticompetitive unless they are part of a program to enforce a manufacturer- or dealer-level cartel.

780 F.2d at 1221.

Only recently, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348; 1356 (1986), this Court admonished that the range of permissible inferences under the antitrust laws is limited, and that permitting illogical inferences to be drawn from proven facts could deter the kind of competitive behavior the antitrust laws are designed to promote.

It is illogical, if not irrational, to presume conclusively that a practice is *per se* injurious to competition in a market where flourishing competition and consumer benefit can so readily and unquestionably be established, and the rule that compels such a presumption should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, if the Court grants the petition of BEC, it should also grant this cross-petition to resolve whether it should continue to apply the *per se* rule to vertical price restraints.

Dated: June 19, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 19th day of June, 1986, three true and correct copies of the foregoing Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served by mail on counsel of record for cross-respondent, Stephen D. Susman, Susman, Godfrey & McGowan, 2400 Allied Bank Plaza, Houston, Texas, 77002.

s/ PETER J. GARTLAND

PETER J. GARTLAND